NO. _____

IN THE

Supreme Court of the United States

October Term, 1970

SOUTHERN STEVEDORING & CONTRACTING COMPANY, *Petitioner*

v.

D/S OVÆ SKOU, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit rendered in the above entitled case.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Eastern District of Texas, Beaumont Division, of August 8, 1964, is reported at 232 F. Supp. 277, but that Court's supplemental findings of fact entered on October 8, 1964 have not been reported. Both the memorandum opinion and supplemental findings are printed as Appendix A to this Petition. The opinion of the United

States Court of Appeals for the Fifth Circuit, is reported at 365 F.2d 341 (1966), and is printed as Appendix B to this Petition. The order of the Court of Appeals below denying Petitioner's timely Petition for Rehearing was entered on June 16, 1970, and is printed as Appendix C to this Petition.

JURISDICTION

The judgment sought to be reviewed from the United States Court of Appeals for the Fifth Circuit was originally entered on August 19, 1966. Petitioner timely filed its Petition for Rehearing which was denied without opinion on June 16, 1970. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. Sec. 1254(1).

QUESTIONS PRESENTED

1.

Who was "best situated to adopt preventive measures and thereby reduce the likelihood of injury"[1] to a longshoreman in a subsequent port (Port Arthur) from the vessel's short hatch board:

1. Was it the stevedore in the vessel's last port (Houston)

   (a) who worked at this hatch for only 11½ hours on one day and completed its work 39 hours before the injury to the longshoreman in Port Arthur,

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1. *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, at page 319, 84 S.Ct. 748, 11 L.Ed.2d 732, at page 740 (1964).

(b) who simply put back in place the same hatch boards supplied to it by the Shipowner earlier that day, and

(c) who could have replaced the short hatch board only if the Shipowner had supplied a new hatch board from its supply on board its vessel?

or

2. Was it the Shipowner:

(a) who knew that the hatch board was too short before the vessel came into Houston, and before the Houston Stevedore worked at the hatch involved,

(b) who had spare hatch boards on the vessel that the Shipowner alone could get from their storage place and deliver to the hatch,

(c) whose Chief Mate personally checked the closing of the hatch by the Houston Stevedore and found nothing wrong with the Houston Stevedore's closure of the hatch,

(d) who continued during the 39 hour period between the Houston Stevedore's last contact with the hatch boards and the longshoreman's injury in Port Arthur, its callous disregard for the longshoremen who were to work the hatch in Port Arthur, by utterly and completely failing to replace the hatch board it knew was too short, and

(e) who utterly and completely failed in its contractual obligations to both the Houston and Port Arthur Stevedores and to the injured long-

shoreman to warn them that there was a short hatch board about which the Shipowner had had knowledge for some period of time before it ever arrived in Houston?

Incredibly, the Court below held it was the Houston Stevedore and not the Shipowner who was "best situated" and had the greater duty to replace the Shipowner's own defective equipment.[2]

2.

Was the Shipowners' flagrant breach of its contractual obligations before, during and after its call in the Port of Houston (as briefly outlined in Question 1) conduct sufficient to preclude its recovery of indemnity from the Houston Stevedore?

or stated another way

Is the shipowner to be rewarded for the breaches of its contractual obligations to the Houston Stevedore in negligently furnishing an unseaworthy vessel with a short hatch board and for the negligence of its crew in not replacing it when they knew it was too short both before the Houston Stevedore worked aboard the vessel and for 39 hours thereafter prior to the longshoreman's injury in Port Arthur?

Even more incredibly, the Court below concluded the Shipowner's conduct did not preclude its recovery of indemnity from the Houston Stevedore and that the Shipowner was to be so rewarded![3]

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2. See full discussion, Reasons for Granting the Writ No. 1, *infra*, pages 10 to 16.

3. See full discussion, Reasons for Granting the Writ No. 2, *infra*, pages 16 to 22.

Were the acts of the Shipowner, the Port Arthur Stevedore and the injured longshoreman himself independent intervening causes which severed any chain of causation that might have existed between the Houston Stevedore's conduct and the injury in Port Arthur some 39 hours later?[4]

Astonishingly, the Court below concluded they were not.

STATEMENT OF THE CASE

A longshoreman employed by the Port Arthur Stevedore[5] was injured on February 29, 1960 at the No. 1 hatch aboard the Shipowner's[6] vessel because of an unseaworthy hatch board (one that was too short) supplied by the Shipowner. Approximately 39 hours earlier the Houston Stevedore[7] had closed the No. 1 hatch with the hatch boards supplied by the Shipowner to the complete satisfaction of the vessel's chief mate.[8] All of the fact issues with respect to the conduct of the Shipowner, the Houston Stevedore and the Port Arthur Stevedore were hotly disputed in the Trial Court.

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4. See full discussion, Reasons for Granting the Writ No. 3, *infra*, pages 22 to 25.

5. Port Arthur Stevedores Division of Port Arthur Shipping Corporation.

6. D/S Ove Skou.

7. Southern Stevedoring & Contracting Company.

8. The United Fruit Company as Time Charterer of the vessel was also a party in the Courts below. United Fruit was found free of fault but was awarded its attorneys fees and expenses with the shipowner to pay 50% of them, the Houston Stevedore 25% and the Port Arthur Stevedore 25%. This Court's ultimate ruling as between the Shipowner and Houston Stevedore will also determine whether United Fruit is entitled to recover this 25% from the Houston Stevedore or from the Shipowner.

but as its fact findings were all affirmed by the Court of Appeals below, the Houston Stevedore reluctantly accepts them as final, even though it shares the view of the Court of Appeals below that this

> ". . . event comes finally to be, not so much what it actually was, as what it has been judicially declared to be. . . ."[9]

This Petition by the Houston Stevedore alone, therefore, is not based on any attack on the facts as found by the Courts below but fully accepting them. As to the conduct of the parties insofar as pertinent to this Petition, the facts so found were:

1. As to the Shipowner

1. In breach of its contractual obligations to them, the hatch board furnished by the Shipowner to both the Houston and Port Arthur stevedores was unseaworthy because it was too short.

2. The Shipowner in breach of its contractual obligations to the Stevedores had negligently supplied the defective

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9. 365 F.2d 341, at page 344, Appendix A, page 41. This reluctance remains because of the testimony of the Shipowner's Chief Officer, the Houston Stevedore, the Port Arthur Stevedore, and the injured man himself, that none of them knew that there was a hatch board that was too short. As the Court below points out (365 F.2d 341, at page 346; Appendix A, page 45), only the walking foreman for the Port Arthur Stevedore testified that there was a short hatch board which he reported to the mate of the vessel after the accident (R. 265-267), but even this was qualified by him when he stated that he only assumed the hatch board was too short because if it hadn't been short it wouldn't have gone down between the beams (R. 284). Nevertheless, as previously indicated, we accept the facts of the event as they have "been judicially declared to be," even though we share the opinion of the Court below that this is "not so much what it actually was".

board, which ultimate fact finding of negligence necessarily includes the wrongful conduct, both contractual and tortious, of the Shipowner in the following particulars:

(a) The Shipowner knew that the hatch board was too short and therefore unseaworthy for some time prior to the Houston Stevedore starting its operation aboard the vessel.

(b) The Shipowner negligently, and in breach of its contractual obligations, failed to warn or advise the Houston Stevedore of this unseaworthy condition.

(c) The Shipowner continued its negligent conduct and the breach of its contractual obligations in failing to replace the unseaworthy hatch board, when it knew that it had been put back in place by the Houston Stevedore, during the voyage to Port Arthur and while in the Port of Port Arthur up to the time of the injury. This negligence and breach of its contractual obligations both to the Houston Stevedore and the Port Arthur Stevedore existed from the time the Houston Stevedore closed the hatch at approximately 10 p.m. on February 27, 1960 until the Port Arthur Stevedore started work at the No. 1 hatch at 1 p.m. on February 29, 1960, a period of approximately 39 hours.

3. The Shipowner negligently and in breach of its contractual obligation to both the Houston and Port Arthur Stevedores failed to warn the Port Arthur Stevedore of the presence of the short hatch board.

2. As to the Houston Stevedore

1. That it breached its warranty of workmanlike service in not reporting the short hatch board to the ship's officer who would have to furnish the necessary replacement or make the repairs.[10]

2. Upon the failure of the vessel's officer to replace or repair its unseaworthy hatch board, the Houston Stevedore breached its warranty of workmanlike service in not stopping the work in an attempt to force the Shipowner to replace the unseaworthy hatch board which the Courts below found the Shipowner knew was too short for some period of time before the vessel arrived in Houston and had negligently and in breach of its contractual obligations to the Houston Stevedore utterly and completely failed to replace.[11]

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10. This was found notwithstanding that the Courts below held the Shipowner already knew the hatch board was too short. And the Shipowner's Chief Officer testified that he did not need anyone to tell him if there was a short hatch board (R. 236), that he checked the closing of the No. 1 hatch in Houston, that the Houston Stevedore had done its work to his satisfaction (R. 228), all of which testimony as to the closing of the hatch was corroborated by the Stevedoring Superintendent for the Houston Stevedore (R. 302, 303).

11. This finding requires the Houston Stevedore to attempt to coerce, or otherwise force the Shipowner to fulfill its contractual obligations to both the Houston and Port Arthur Stevedores of replacing and repairing the unseaworthy short hatch board, and if it does not attempt these coercive tactics, the Shipowner, who has the sole and exclusive duty to furnish seaworthy hatch boards and to replace any that were defective, will be permitted to recover its damages from a Stevedore who worked at this hatch for only 11½ hours. This holding imposes a substantially greater duty to replace an unseaworthy appliance of the vessel on the Houston Stevedore who was aboard the vessel for only a few hours than it does on the Shipowner itself who completely failed in its basic and fundamental duty to any invitee to furnish seaworthy hatch boards and replace them when it knows that they are defective.

3. As to the Port Arthur Stevedore

1. It breached its warranty of workmanlike service in failing to observe the short hatch board, so that it was charged with knowledge of the existence of the short hatch board prior to the accident.

2. It breached its warranty of workmanlike service in not taking steps to avoid an injury occurring as a result of the short hatch board when it was charged with knowledge of it.

3. It breached its warranty of workmanlike service because it did not show that its gang foreman had supervised the opening of the hatch.

4. As to the Injured Longshoreman

1. The injured longshoreman both negligently and in breach of his own contractual obligations to the Port Arthur Stevedore and the Shipowner failed to keep a proper lookout for his own safety.

On these facts the Trial Court held that the liability to the injured longshoreman should fall 50% on the Shipowner and 25% each on the Houston and Port Arthur Stevedores.[12]

The Court of Appeals, so far as material here, reversed the Trial Court's finding that the Shipowner should bear 50% of the liability and held that the stevedores should bear 100% of the liability, 50% by the Houston Stevedore and 50% by the Port Arthur Stevedore.

12. The injured longshoreman's conduct was held to have contributed 20% to his own injury and thus he was held entitled to recover 80% of his total damages from the Shipowner and stevedores in these proportions.

This Petition is filed by the Houston Stevedore only, and it is respectfully submitted that whatever the result may be as between the Shipowner and Port Arthur Stevedore, the imposition of any liability on the Houston Stevedore was clearly wrong and a grave miscarriage of justice in direct conflict with the teachings of this Court in this area of the maritime law and cannot be permitted to stand.

REASONS FOR GRANTING THE WRIT

1.

Decision Below Is In Conflict With This Court's Decision In *Italia*

The decision of the Court below allowing the Shipowner to recover 50% indemnity from the Houston Stevedore is in direct and irreconcilable conflict with this Court's decision in *Italia Societa v. Oregon Stevedoring Company, Inc.*, 376 U.S. 314, 11 L.Ed.2d 732, 84 S.Ct. 748 (1964). In *Italia*, the basic rule to be used in determining whether a shipowner or a stevedore should bear the loss of an injury to a longshoreman was concisely stated by this Court:

> ". . . Liability should fall upon the party best situated to adopt preventive measures and thereby reduce the likehood of injury."[13]

Applying this *Italia* standard, as between the Shipowner and the Houston Stevedore who should bear the loss would be determined by the answer to this question:

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13. 376 U.S. 315, at 319, 11 L.Ed.2d 732, at page 740, 84 S.Ct. 748. Although the Court below had quoted this precise rule from *Italia* and followed it in an earlier case, in the present case the Court below completely ignores it even though it cites *Italia* in footnotes 1 and 17 on other questions. See *Waterman Steamship Corporation v. David*, 5 Cir. 1965, 353 F.2d 660, at page 664, cert. denied 384 U.S. 972, 16 L.Ed.2d 683, 86 S.Ct. 1863 (1966).

Weighing the reciprocal contractual obligations owed by the Shipowner and the Houston Stevedore to each other, who was "best situated to adopt preventive measures and thereby reduce the likelihood of injury?"

In answering this question we must consider the contractual obligations of these two parties with respect to the vessel's short hatch board and the conduct of each party with respect to these obligations:

1. This defective hatch board was a piece of the vessel's own equipment which the Shipowner itself (and not any stevedore) had the basic and fundamental contractual duty to maintain and to furnish to the Houston Stevedore, in a seaworthy condition. The Shipowner was found to have negligently breached this contractual duty by supplying the defective hatch board.

2. The Shipowner owed a contractual duty to the Houston Stevedore to replace the unseaworthy hatch board before turning the hatch over to the Houston Stevedore to undertake its operations. The Shipowner knew it was too short before the vessel arrived in Houston and negligently failed to meet this contractual obligation to the Houston Stevedore.

3. The Shipowner owed a contractual duty to the Houston Stevedore to warn it of any such defective equipment on the vessel. No such warning was given.

4. The Houston Stevedore owed the Shipowner a contractual duty to do its work in a reasonably safe and workmanlike manner. The Houston Stevedore was found to have breached this duty because it put the vessel's defective hatch board back in place after

completing its work, even though the Shipowner's chief mate had no complaints about the way the Houston Stevedore performed its contract.

5. The Shipowner owed the Houston Stevedore (and the Port Arthur Stevedore as well) a contractual obligation to replace the unseaworthy hatch board when its chief mate knew that it had been put back in place in Houston. The Shipowner negligently breached this contractual obligation to both stevedores from the time the hatch was closed in Houston at approximately 10 p.m. on February 27, 1960, until the Port Arthur Stevedore started work at 1 p.m. on February 29, 1960, a period of approximately 39 hours.

6. The Shipowner owed a contractual duty to both the Houston and Port Arthur stevedores to warn the Port Arthur Stevedore of the unseaworthy hatch board. The Shipowner did not meet this contractual obligation as no such warning was given.

When these reciprocal contractual obligations and their conduct with respect to them are borne in mind, as between the Shipowner and the Houston Stevedore, it becomes quite obvious that the Shipowner—not the Houston Stevedore—was "the party best situated to adopt preventive measures and thereby reduce the likelihood of injury."[14]

14. As we have previously indicated we are here concerned—as between the Shipowner and the Houston Stevedore—only with the question of which one of them was best situated to adopt preventive measures and reduce the risk of injury to the longshoremen at the next port of Port Arthur. The Courts below concluded that the Port Arthur Stevedore had knowledge of the short hatch board before the accident occurred and should have taken measures to prevent the

In fact, from the time the vessel sailed from Houston until the vessel arrived in Port Arthur where the injury occurred approximately 32 hours later, it was a physical impossibility for the Houston Stevedore to take any preventive measures whatsoever. Precisely, the opposite is true as the only party who was in any way situated to adopt any preventive measures during the voyage from Houston to Port Arthur and while the vessel was at the dock in Port Arthur before work started at the No. 1 hatch where the injury occurred was the Shipowner itself. Even though it had full and complete knowledge of this unseaworthy hatch board during this time, in an utter and complete disregard of its contractual obligations to both the Houston Stevedore and the Port Arthur Stevedore, the Shipowner did nothing to remedy this unseaworthy condition on its vessel. The Shipowner's conduct is all the more callous because the means of replacing this short hatch board was available at all times aboard the vessel.[15]

While it never refers to this basic rule from *Italia*, there is one statement in the opinion of the Court of Appeals below which indicates it was trying to apply a similar rule. In concluding that the Houston Stevedore was liable

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injury by removing the defective hatch board before letting their longshoremen walk on the hatch. As removing the vessel's hatch boards from the hatch in order to stevedore the vessel was a part of the Port Arthur Stevedore's contractual duties, the Courts below correctly concluded that as between the Shipowner and the Port Arthur Stevedore, the latter was best situated to adopt preventive measures, and therefore had to indemnify the Shipowner. As was true of the Houston Stevedore, however, the Port Arthur Stevedore had no duty to correct the vessel's own unseaworthy hatch board, but only the duty to adopt preventive measures to protect its own longshoremen.

15. Either from a supply of them or by making one in the ship's carpentry shop as the Chief Mate testified.

to indemnify the Shipowner for the injuries to this Port Arthur longshoreman, the Court below said it did so because

> ". . . The stevedore having the last operational contact with them is in a position to avoid altogether, or minimize greatly, the hazard . . ."[16]

But even if we accept this as a short rendition of the *Italia* rule, on what possible basis can it be said that the "last operational contact" with this short hatch board was by the Houston Stevedore? There were at least two other operational contacts which completely intervened between the Houston Stevedore's "last operational contact" with this short hatch board and the accident to the Port Arthur longshoreman some 39 hours later in another port. These were:

1. While it is possible that the Shipowner may not have physically touched the short hatch board after the Houston Stevedore, it is undisputed that the vessel was absolutely and completely in control of the Shipowner during this thirty-nine hour period and that the Shipowner had a continuing, non-delegable duty to replace the short hatch board but utterly and completely failed to do anything whatsoever. To conclude that the Shipowner did not have "operational contact" not only with this short hatch board but with any other unseaworthy conditions on board its vessel as well during this period is absurd. One thing is certain—the Houston Stevedore didn't have any contact with it at all.

16. 365 F.2d 341, at page 348. (Appendix B, *infra*, page 51).

2. But entirely apart from the Shipowner's contact, the "last operational contact" with this short hatch board prior to the accident was that of the Port Arthur Stevedore. The Court below held that the Port Arthur Stevedore had had sufficient "operational contact" with it to know that the hatch board was too short and that it had breached its warranty of workmanlike performance because it did not take steps to prevent the injury. Thus the last party who had "operational contact" with the instrument that caused the longshoreman's injury was not the Houston Stevedore as the Court below concluded, but was in truth and in fact the Port Arthur Stevedore.

If, as the Court below stated, the stevedore who had the last operational contact with the hatch board should be liable because it was in a position to avoid the hazard, in this case the liability must fall entirely on the Port Arthur Stevedore.

This Court concluded its discussion of this basic rule in *Italia* by stating:

> ". . . But we deal here with a suit for indemnification based upon a maritime contract, governed by Federal law. . . . in an area where rather special rules governing the obligations and liability of shipowners prevail, rules that are designed to minimize the hazards encountered by seamen, to compensate seamen for the accidents that inevitably occur, and to minimize the likelihood of such accidents. *By placing the burden ultimately on the company whose default caused the injury*, . . ., we think our decision today is in furtherance of these objectives."[17] (Emphasis supplied)

17. *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 314, at 324, 84 S.Ct. 748, 11 L.Ed.2d 732, at 741 (1964).

While the Court below was correct in holding that the Port Arthur Stevedore was better situated to adopt preventive measures than the Shipowner, there is no basis on which to support its conclusion that the Houston Stevedore was also better situated to adopt measures to prevent the accident in Port Arthur than was the Shipowner. In thus awarding indemnity to the Shipowner with the Houston Stevedore and the Port Arthur Stevedore each paying 50%, the Court below reached a result directly contrary to that required by this Court's decision in *Italia*. It is respectfully submitted that the writ should issue to correct this miscarriage of justice.

2.

This Case Involves Important Question of Federal Maritime Law Which Is the Other Side of This Court's Decisions in *Ryan*, *Weyerhaeuser* and *Italia* And Should be Authoritatively Settled by This Court

In *Ryan*[18] this Court created a cause of action for indemnity in favor of a shipowner against a stevedore who failed to do its work in a reasonably safe and workmanlike manner. What was implied in *Ryan* was made perfectly clear two years later in *Weyerhaeuser*[19] when this Court held that the shipowner was entitled to indemnity only if its own conduct was not sufficient to preclude its recovery of indemnity. Although *Weyerhaeuser* was decided in 1958, this Court has not yet furnished any real help or guidelines on what conduct of a shipowner

18. *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956).

19. *Weyerhaeuser S.S. Co. v. Nacirema Co.*, 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed.2d 491 (1958).

is sufficient to preclude indemnity except for that contained in *Italia,* heretofore discussed under Reason 1, *supra* that

> ". . . Liability should fall upon the party best situated to adopt preventive measures and thereby reduce the likelihood of injury . . ."

For the reasons we have pointed out in Reason 1, it is apparent that this general statement does not furnish sufficient guidelines to the Courts below, for one can hardly imagine any more callous disregard of its contractual obligations on the part of a shipowner than that displayed in this case toward the Houston Stevedore. Its conduct is nothing short of a heedless disregard for the safety of others —gross negligence! If such conduct—both before and after the Houston Stevedore worked aboard the vessel—is not conduct sufficient to preclude the Shipowners' recovery of indemnity from the Houston Stevedore, this Court's rule on preclusion is meaningless—nothing more than idle chit-chat to which the lower courts may give lip service from time to time but never apply in any realistic way.

In this case, there is no way to escape the undisputed fact that the basic and fundamental contractual responsibility to see that the hatch board was seaworthy and to replace it if it was not, was that of the Shipowner and the Shipowner alone.[20] Yet the Court below has held

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20. The Shipowner alone had the contractual duty to furnish a replacement for the short hatch board. Had this been furnished to the Houston Stevedore when it covered the hatch in Houston some 39 hours prior to the longshoreman's injury in Port Arthur, the Houston Stevedore would have put it in place, but the Houston Stevedore was powerless to force the Shipowner to furnish a replacement and the Shipowner has been found to have had knowledge of the defective hatch board prior to the injury for a substantially

that by agreeing to perform stevedoring services at the No. 1 hatch aboard this vessel, the Houston Stevedore, as between it and the Shipowner, impliedly agreed to take over the Shipowner's basic and fundamental contractual obligation (to supply and replace the vessel's own defective equipment) and to indemnify the Shipowner for any injuries that might be sustained not just by its own employees in Houston, but in subsequent ports as well, and that it impliedly so agreed regardless of how negligent, regardless of how indifferent and callous the Shipowner might be with respect to this condition, and regardless of the Shipowner's flagrant breach of its contractual obligations to the Houston Stevedore both before and after the vessel's stay in Houston in not replacing the hatch board it knew was too short. Such a holding, we submit, in all deference to the Court below, is patently absurd.

On this preclusion issue this case presents the "other side of the coin" from that presented in *Ryan*, *Weyerhaeuser* and *Italia*. In those three cases the actual defect or unseaworthy condition of the vessel which caused the injury was created by the stevedore in a direct breach of its contractual obligations to the shipowner and the stevedore was "best situated to adopt preventive measures and thereby reduce the likelihood of injury".[21]

longer time than the Houston Stevedore. Thus this is not a case in which only the stevedore knew of the defective equipment but one in which the Shipowner was fully aware of its defective equipment both before and after the Houston Stevedore worked on board the vessel for approximately 11½ hours in the Port of Houston.

21. In *Ryan* the cargo was improperly stowed in the Port of Georgetown, South Carolina, and a longshoreman employee of the same stevedore was injured in the Port of Brooklyn, New York, because of this condition. As between the shipowner and the stevedore, liability was placed on the steve-

The "other side" of this *Ryan, Weyerhaeuser* and *Italia* coin which this case presents as between the Shipowner and the Houston Stevedore, can best be demonstrated by briefly placing the factors involved side by side in columnar form:

	Ryan, Weyerhaeuser & Italia	This Case
1. Unseaworthy equipment which caused injury furnished by	Stevedore	Shipowner
2. Contractual obligation to remedy or correct unseaworthy condition which was breached was owed by	Stevedore to Shipowner	Shipowner to Stevedore
3. Party "best situated to adopt preventive measures and thereby reduce the likelihood of injury" was	Stevedore	Shipowner

dore who not only had the contractual obligation to correct the defect but was also best situated to adopt preventive measures in both ports.

2. In *Weyerhaeuser*, the stevedore had erected a temporary winch shelter to protect its longshoremen from the weather in the Port of New York, and continued to use it in its defective and unseaworthy condition upon the vessel's arrival in the Port of Boston. The case was remanded to permit the fact issues on both the stevedore's breach and the shipowner's conduct bearing on preclusion to be submitted to the jury. But in doing so, this Court indicated quite clearly, that as between the shipowner and the stevedore, that the stevedore had both the contractual duty to correct the defect in its own winch shelter and was best situated to correct the condition.

3. In *Italia*, the injury was caused by a latent defect in a piece of gear furnished by the stevedore in connection with its cargo operations. As between the shipowner and stevedore, the Court held the stevedore had breached its contractual obligations to the shipowner in furnishing unseaworthy equipment and that liability should fall on the stevedore who was in the best position to adopt preventive measures.

In *Ryan, Weyerhaeuser* and *Italia,* it was the stevedore's breach of its contractual obligation to the Shipowner which caused the injury, whereas in this case precisely the opposite is true — it was the Shipowner's breaches of its contractual obligations to the Houston Stevedore which caused the injury in Port Arthur. Yet the decision of the Court below holds in effect, whether the Shipowner's or the Houston Stevedore's violations of their contractual obligations to each other cause a longshoreman's injury, liability is to fall on the Houston Stevedore. This holding of the Court below puts shipowners in the position of playing a "game" with the lives and safety of longshoremen aboard their vessels in which they never lose—if the "coin" comes up "heads" (on its *Ryan, Weyerhaeuser* and *Italia* side), the shipowner wins, and if it comes up "tails" (this case), the stevedore loses!

To permit the decision of the Court below to stand as to the Houston Stevedore, in the words of the Court of Appeals for the Ninth Circuit,

> ". . . would place a premium upon unseaworthiness of the ship and negligence by her crew and officers. This . . . would reverse the maritime policy of ages, which has even firmer foundations under modern conditions."[22]

This is precisely why we earlier stated this preclusion issue as one of the Questions Presented by this Petition in this alternative form:

> "Was the Shipowner's flagrant breach of its contractual obligations before, during and after its call in the Port of Houston conduct sufficient to preclude

22. *United States v. Harrison,* 9 Cir., 1957, 245 F.2d 911, at 915.

its recovery of indemnity from the Houston Stevedore?"

or stated another way

Is the shipowner to be rewarded for the breaches of its contractual obligations to the Houston Stevedore in negligently furnishing an unseaworthy vessel with a short hatch board and for the negligence of its crew in not replacing it when they knew it was too short both before the Houston Stevedore worked aboard the vessel and for 39 hours thereafter prior to the longshoreman's injury in Port Arthur?[23]

The conclusion is inescapable that the decision of the Court below — to the extent that it holds the Houston Stevedore liable to the Shipowner in this case — absolutely and completely destroys any possible incentive the Shipowner might otherwise have to replace not only its short hatch boards, but any other unseaworthy cargo gear aboard its vessel. Why? Simply because its holding means the negligent Shipowner and its crew did not have to worry about the Houston Stevedore's employees getting hurt by the vessel's own unseaworthy cargo gear because either the Houston Stevedore or the stevedore in its last previous port, or both, would have to indemnify it; and as to injuries in future ports it would get indemnity from the Houston Stevedore or the stevedore in the next port, or both. Why should the Shipowner and its crew waste their time supplying replacement hatch boards when the Shipowner wouldn't have to pay anyway?[24]

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23. Question Presented No. 2, *supra*, page 4.

24. This vessel went from Port Arthur to New Orleans to Kingston to Santa Maria. Query: If the stevedores in Port Arthur, New Orleans and Kingston all did exactly the same thing the Houston

The Houston Stevedore respectfully submits that its Petition should be granted to correct the grossly erroneous decision of the Court below as to it, a decision which can by no stretch of the imagination be said to in any way comport with the teachings of this Court in *Ryan, Weyerhaeuser* and *Italia* or in any way further the objectives of this Court as set out in those three cases.

3.

The Decision of Court Below Is In Direct Conflict With The Decision of The Court of Appeals For The Second Circuit On Independent Intervening Cause

Despite the Houston Stevedore's repeated strenuous efforts to get a decision on this issue of independent intervening cause, both the Trial Court and the Court of Appeals below have steadfastly refused to even mention it.[25]

Stevedore did and a longshoreman was hurt by the short hatch board in Santa Maria, who would have to indemnify the Shipowner then? Would the Court below "allow 100% indemnity against each of the" Houston, Port Arthur, New Orleans, Kingston and Santa Maria stevedores "to be borne by them" 20-20-20-20-20? Or would it "allow 100% indemnity against each of the" last two stevedores only in Kingston and Santa Maria "to be borne by them 50-50" as it has done in this case? The only thing that is certain from the decision of the Court below is the shipowner wouldn't have to worry or pay even though it was the Shipowner's short hatch board and its grossly negligent failure to replace it that caused the injury. (Quoted words from Opinion of Court below, 365 F.2d 341, at page 351, Appendix B, page 56)

25. While we can only speculate why they have both been so strangely and curiously silent on this issue, the only explanation appears to be that there is no answer to it and they would have had to exonerate the Houston Stevedore which, for some unfathomable reason they did not want to do. The Court of Appeals below pondered this in the Houston Stevedore's Petition for Rehearing for 3 years and 9 months before denying it without opinion—and without any answer. Perhaps the answer is so obvious that everyone but the Houston Stevedore's inept counsel knows what it is and it is unnecessary to articulate it just for them.

In declining to hold that the independent, intervening conduct of the Shipowner, the Port Arthur Stevedore and the injured longshoreman severed the chain of causation between the conduct of the Houston Stevedore and the injury some 39 hours later, the decision of the Court below is in direct and irreconcilable conflict with the decision of the Court of Appeals for the Second Circuit in *Reddick* where the rule was stated thusly:

> ". . . *Under the general test of foreseeability applied to contractual liability*, a breach must have been the cause of the injury. We think that in this case the latent defect in the board on the top of the crate was an intervening cause which broke any causal chain that might otherwise have existed."[26] (Emphasis supplied)

We do not intend to be repetitious or to unduly prolong this Petition, but suffice it to say at this point, the following independent, intervening acts and/or omissions all occurred subsequent to the Houston Stevedore's conduct, and without any one of them, the Port Arthur longshoreman would never have been injured:

1. With full knowledge of the short hatch board and with an affirmative duty to replace it, the Shipowner both negligently and in breach of its contractual obligations did absolutely nothing to remedy its own equipment which caused the injury or to warn the Stevedores about it during the 39 hours between the Houston Stevedore's conduct and the injury in Port Arthur.

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26. *Reddick v. McAlister Lighterage Line, Inc.*, 2 Cir., 1958, 258 F.2d 297, at 300, cert. denied 358 U.S. 908, 79 S.Ct. 235, 3 L.Ed. 2d 229 (1958).

2. The Port Arthur Stevedore with full knowledge of the short hatch board, negligently and in breach of its contractual obligations failed to take the steps readily available to it that would have prevented the injury.

3. The injured longshoreman himself both negligently and in breach of his own contractual obligations to his employer and the Shipowner, failed to keep a proper lookout for his own safety.

If any of these three parties had performed their contractual obligations, the Port Arthur longshoreman would not have been injured. What more independent, intervening conduct by any of these three parties or by anyone else would serve to break the chain of causation if it was not broken in this case? On what basis can it be said that the Houston Stevedore should have foreseen or anticipated these breaches of their obligations by the Shipowner, the Port Arthur Stevedore and by the injured longshoreman himself? Perhaps it should have foreseen that the Shipowner would continue its callous refusal to replace its own unseaworthy hatch board for another 39 hours since this had been going on for some time even prior to the vessel's arrival in Houston, but even this is absurd. In any event, there is no basis on which to conclude that the Houston Stevedore should have reasonably foreseen still a SECOND intervening cause (that of the Port Arthur Stevedore), and even more incredibly a THIRD intervening cause (that of the injured longshoreman). Without any one of the FIRST or SECOND or THIRD independent intervening causes, the accident would never have occurred.

The Houston Stevedore therefore respectfully submits that unless this Court wishes to create an entirely new and different standard of causation for these *Ryan* indemnity cases, the independent, intervening acts of the Shipowner, the Port Arthur Stevedore and the longshoreman himself severed the chain of causation between the Houston Stevedore's conduct and the accident. Once severed, the Houston Stevedore's conduct does not cast it in liability to the Shipowner as the Court of Appeals for the Second Circuit held in *Reddick*. This Petition should be granted to resolve the conflict in the decision of the Court below with that in *Reddick* on independent intervening cause.

CONCLUSION

For the reason heretofore stated, the Houston Stevedore respectfully submits that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

E. D. VICKERY
MAYO J. THOMPSON

Of Counsel:

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877 San Jacinto Building
Houston, Texas 77002

Attorneys for Petitioner,
Southern Stevedoring & Contracting Company

CERTIFICATE OF SERVICE

I certify that the foregoing Petition for a Writ of Certiorari has been served upon Messrs. Mandell & Wright, First National Life Building, Houston, Texas, 77002, Attorneys for Plaintiff; Messrs. Baker, Botts, Shepherd & Coates, Esperson Building, Houston, Texas 77002, Attorneys for D/S Ove Skou; Messrs. Eastham, Watson, Dale & Forney, Esperson Building, Houston, Texas 77002, Attorneys for United Fruit Company; Messrs. Fulbright, Crooker, Freeman, Bates & Jaworski, Bank of the Southwest Building, Houston, Texas 77002, and Messrs. Strong, Pipkin, Strong & Nelson, McFaddin Building, Beaumont, Texas, Attorneys for Port Arthur Stevedores Division of Port Arthur Shipping Corporation, by mailing copies to them at the address shown, first class postage prepaid, on the 12th day of August, 1970.

Of Royston, Rayzor & Cook

APPENDIX "A"

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

JAMES B. HEBERT,

Libellant

versus A. D. No. 816

D/S OVE SKOU A/S and
UNITED FRUIT COMPANY,

Respondents-
Impleading Petitioners

versus

SOUTHERN STEVEDORING & CONTRACTING COMPANY and PORT ARTHUR SHIPPING CORPORATION,

Impleaded Respondent

MEMORANDUM OPINION INCLUDING FINDING OF FACT & CONCLUSION OF LAW

Mr. Herman Wright
Mandell and Wright
South Coast Building
Houston, Texas

PROCTORS FOR LIBELLANT

Mr. B. D. McKinney
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PROCTORS FOR RESPONDENT,
D/S OVE SKOU

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PROCTORS FOR IMPLEADED
RESPONDENT,
PORT ARTHUR STEVEDORES DIVISION
OF PORT ARTHUR SHIPPING
CORPORATION

MEMORANDUM

Libellant, James J. Hebert, was an employee of the Impleaded Respondent, Port Arthur Shipping Corporation, and while in the course of his employment and engaged in unloading the M/V JETTYE SKOU, owned by the Respondent, D/S Ove Skou, was injured when a hatch board gave way and he partially fell into the hatch while said vessel was at Port Arthur, Texas.

The cover of the hatch had just been removed and Libellant was the first one on the hatch and was preparing to take the first or second board off of the hatch at the time of the accident. The hatch board was a part of the ship's equipment and had been placed on the hatch by Impleaded Respondent, Southern Stevedoring & Contracting Company, in their loading operation at Houston, Texas, prior to the accident.

Libellant sues the vessel owner, D/S Ove Skou, and the time charterer, United Fruit Company, claiming negligence because the hatch board was too short for its intended purpose; that this amounted to unseaworthiness of the vessel; and that such unseaworthiness was a proximate cause of the accident and injuries and damages to Libellant.

The respondent shipowner, D/S Ove Skou, impleaded Southern Stevedoring & Contracting Company and Port Arthur Shipping Corporation, seeking full indemnity from Southern Stevedoring & Contracting Company for a breach of implied warranty in the manner of handling and placing said short hatch board on the hatch; and against Port Arthur Shipping Corporation for a breach of implied warranty in the manner of handling and removing said short

hatch board; both of said acts of negligence on the part of the stevedoring companies being a proximate cause of the injuries and damages to Libellant.

At the time of Libellant's injury, the M/V JETTYE SKOU was under time charter from Respondent, D/S Ove Skou, to Respondent, United Fruit Company. The time charter did not effect a demise of the vessel, and therefore United Fruit Company has no liability to longshoreman, James B. Hebert; further, Respondent, United Fruit Company, is not liable to the shipowner, D/S Ove Skou, but rather, is entitled to indemnity from both Southern Stevedoring & Contracting Company and Port Arthur Shipping Corporation for attorneys' fees and expenses incurred in defense of said cause of action.

It is the position of Southern Stevedoring & Contracting Company that a latent defect was involved in connection with the short hatch board that caused Libellant's injury; that the shipowner's conduct precludes its right to indemnity in that the shipowner was in a better position to ascertain the condition of the hatch board, and permitted the continued existence of unseaworthy gear on its vessel, S/S JETTYE SKOU; further, that Southern Stevedoring & Contracting Company should be entitled to indemnity from Port Arthur Shipping Corporation because the negligent conduct of Port Arthur Shipping Corporation is a new, independent and intervening cause.

It is the position of Port Arthur Shipping Corporation that Respondent, D/S Ove Skou, is not entitled to recover full indemnity because of the unseaworthiness of the ship, in that, there was a breach of duty to furnish a reasonably safe ship to load and unload; further, it was

not negligent and did not in any way fail to perform its stevedoring services with reasonable safety; further, Southern Stevedoring & Contracting Company has no claim for indemnity against Port Arthur Shipping Corporation because the employees of the former, in closing the hatch at Houston, Texas, were guilty of active negligence in knowingly placing the short hatch board on the hatch and in failing to warn, and because Port Arthur Shipping Corporation was the employer of Libellant and protected by Section 5 of the Longshoremen's and Harbor Workers Act.

This cause of action came on for trial before the Court in Admiralty; the Libellant appeared in person and by his proctor, and the Respondents and Impleaded Respondents appeared by and through proctors, and testimony having been offered and briefs filed by all parties, and the Court having been fully advised in the premises, now makes and files its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I.

The M/V JETTYE SKOU is and was at all times material hereto, owned by Respondent, D/S Ove Skou.

II.

The M/V JETTYE SKOU was, at all times material hereto, under time charter to United Fruit Company in accordance with the charter party contract in evidence herein. There is no basis for liability of United Fruit Company to Libellant, James B. Hebert.

III.

On February 29, 1960, while the M/V JETTYE SKOU was on navigable water in Port Arthur, Libellant, James B. Hebert, sustained an injury on the forecastle at Hatch No. 1 of the vessel, when he stepped on a short hatch board which gave way beneath him.

IV.

The hatch board in question was a part of the ship's equipment and was too short to reach from the flange of one kingbeam to the flange of the other kingbeam.

V.

The Respondent, D/S Ove Skou, failed to provide Libellant, James B. Hebert, a reasonably safe place to work because of the short hatch board supplied by said vessel for use at Hatch No. 1, and thus, the hatch board in question was not adequate for its intended purpose, rendering the M/V JETTYE SKOU unseaworthy, which contributed to cause the accident and injuries suffered by Libellant.

VI.

The Respondent, D/S Ove Skou, impleaded Respondent, Southern Stevedoring & Contracting Company, who placed the short hatch board on Hatch No. 1, while performing stevedoring services aboard the M/V JETTYE SKOU in Houston, Texas; and also impleaded Respondent, Port Arthur Shipping Corporation, a stevedoring company which was in the process of removing the hatch board at Port Arthur, Texas at the time the accident occurred.

VII.

Both Southern Stevedoring & Contracting Company and Port Arthur Shipping Corporation were acting under authority given them by United Fruit Company, the charterer of the vessel, M/V JETTYE SKOU, and each such stevedore had full control of the work and work space while it was working aboard the vessel.

VIII.

Southern Stevedoring & Contracting Company, in placing the hatch board in question in the place where it was, and in not observing that it was short, failed to do its work in a safe and workmanlike manner, which contributed to cause the accident and injuries suffered by Libellant.

IX.

Port Arthur Shipping Corporation, in removing the hatch board in question and in not observing that it was short, failed to do its work in a safe and workmanlike manner, which contributed to cause the accident and injuries suffered by Libellant.

X.

Libellant negligently failed to keep a proper lookout for his safety, which contributed to cause his injuries by twenty (20%) per cent.

XI.

As a result of his injuries, Libellant has sustained damages for loss of wages, pain and suffering of Twenty Thousand ($20,000.00) Dollars, to and including De-

cember 2, 1962, plus medical expenses in the sum of One Thousand One Hundred Twenty-one and 95/100 ($1,121.95) Dollars.

XII.

In the future, Libellant will suffer damages for loss of wages, pain and suffering in the total sum of Thirty Thousand ($30,000.00) Dollars.

XIII.

Respondent, D/S Ove Skou, created the unseaworthy condition of the vessel, M/V JETTYE SKOU, by equipping said vessel with a short hatch board and thus, contributed to cause the accident and injuries suffered by Libellant, and is entitled therefore to only fifty (50%) per cent indemnity from Southern Stevedoring & Contracting Company and Port Arthur Shipping Corporation in equal amount of twenty-five (25%) per cent each, based on their equal failure to perform their respective stevedoring work in a safe and workmanlike manner, which also contributed to cause the accident and injuries suffered by Libellant.

XIV.

All stipulations in the pre-trial order are adopted and incorporated herein by reference.

CONCLUSIONS OF LAW

I.

Libellant is entitled to a decree in the amount of Forty-one Thousand One Hundred Twenty-one and 95/100 ($41.121.95) Dollars against Respondent, D/S Ove Skou,

with interest at six (6%) per cent from date of judgment, out of which he is to repay Intervenor its lien.

II.

Respondent, D/S Ove Skou, is entitled to judgment against Southern Stevedoring & Contracting Company and Port Arthur Shipping Corporation, jointly and severally, for fifty (50%) per cent indemnity of total judgment paid, including court costs.

III.

Respondent and Impleaded Respondent, United Fruit Company, is entitled to judgment against Port Arthur Shipping Corporation and Southern Stevedoring & Contracting Company, jointly and severally, for its reasonable attorneys' fees and expenses, to be determined by the Court if not agreed upon by counsel within thirty (30) days from this date.

IV.

Costs to be adjudged equally between Respondent, D/S Ove Skou, fifty (50%) per cent, and Southern Stevedoring & Contracting Company and Port Arthur Shipping Corporation, jointly, fifty (50%) per cent.

ENTERED this the 8th day of August, 1964.

(Signed) JOE J. FISHER
UNITED STATES
DISTRICT JUDGE

SUPPLEMENTAL FINDINGS OF FACT

Filed: October 8, 1964

In the United States District Court for the
Eastern District of Texas Beaumont Division

James B. Hebert,

Libellant,

versus Admiralty No. 816

D/S Ove Skou, et al,

Respondents.

versus

Southern Stevedoring & Contracting
Company, et al,

Impleaded
Respondents

Be it remembered that on the 25th day of September, 1964, came on for hearing the issue concerning the amount, reasonableness and necessity of the proctors' fees and expenses of defense incurred by the Respondent, United Fruit Company, and also came on for hearing the various motions of the parties for additional findings of fact, and after hearing evidence and argument of counsel for all parties, all motions for additional findings of fact are hereby overruled and the following facts are found:

I.

That proctors for Respondent, United Fruit Company, have expended 195 hours in connection with the trial preparation and handling of this case in behalf of United

Fruit Company, including time spent both in defense of the Libellant's suit, in defense of the shipowner's action over against United Fruit Company, and in connection with the prosecution on behalf of United Fruit Company of its claim for indemnification against both Southern Stevedoring & Contracting Company and Port Arthur Shipping Corporation.

II.

That of said 195 hours so expended, 113¼ hours are attributable solely to services performed in connection with defense, and are recoverable by United Fruit Company as indemnification herein at a rate of $30.00 per hour, or a total sum of $3397.50. Such fee is reasonable and was necessarily incurred in the defense of the claims made against Respondent, United Fruit Company.

III.

That total disbursements expended by United Fruit Company in connection with this claim and suit amounted to the sum of $162.16, and the sum of $129.33 is attributable solely to the defense of the claims and suit herein. Such sum was reasonable and necessary and is recoverable by Respondent, United Fruit Company, as indemnification.

IV.

That the Respondent, D/S Ove Skou, was negligent in supplying the short hatch board for use at hatch number one, which negligence contributed to cause the accident and injuries suffered by Libellant.

V.

That the above proctors' fees and expenses of defense recoverable by Respondent, United Fruit Company, are attributable fifty per cent (50%) to Respondent D/S Oye Skou and fifty per cent (50%) to Impleaded Respondents Southern Stevedoring & Contracting Company and Port Arthur Shipping Corporation.

ENTERED this 8th day of October, 1964.

(Signed) JOE J. FISHER
United States
District Judge

APPENDIX "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22205

D/S OVE SKOU,

Appellant,

versus

JAMES B. HEBERT, ET AL.,

Appellees.

PORT ARTHUR SHIPPING CORPORATION,

Appellant,

versus

D/S OVE SKOU, ET AL.,

Appellees.

SOUTHERN STEVEDORING & CONTRACTING COMPANY,

Appellant,

versus

D/S OVE SKOU and UNITED FRUIT COMPANY,

Appellees.

JAMES B. HEBERT,

Appellant,

versus

D/S OVE SKOU and UNITED FRUIT COMPANY,

Appellees.

Appeals from the United States District Court for the Eastern District of Texas.

(August 19, 1966.)

Before JONES and BROWN, Circuit Judges, and DYER, District Judge.

BROWN, Circuit Judge: This is another of the growing number of multi-party Donnybrook Fairs in which like Kilkenny cats, *American Fidelity & Casualty Co. v. Pennsylvania Threshermen's Casualty Ins. Co.*, 5 Cir., 1960, 280 F.2d 453, 455, 456, all lash out against each other in the hope that someway from someone, somehow all or part of the Sieracki-Ryan-Yaka-Italia[1] fallout can be visited on another. Here the new twist, if not a wrinkle, *Mike Hooks, Inc. v. Pena*, 5 Cir., 1963, 313 F.2d 696, 1963 AMC 355, is a sort of sea-going solomonic distribution through percentage reduction of the injured worker's recovery and a three-way split of the remainder as

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1. Seas Shipping Co. v. Sieracki, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, ____AMC____; Ryan Stevedoring Co. v. Pan Atlantic SS Corp., 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133, ____AMC____; Reed v. The S.S. Yaka, 1963, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448, ____AMC____; Italia Socita Per Azioni di Navigazione v. Oregon Stevedoring Co., 1964, 376 U.S. 315, 84 S.Ct. 748, 11 L.Ed.2d 732, ____AMC____.

between the Shipowner and two separate Stevedores. *The Noah's Ark v. Bentley and Felton Corp.*, 5 Cir., 1961, 292 F.2d 437, 438, 1961 AMC 1641. From the wings, the Time Charterer, exonerated of all primary or secondary liability, comes in to collect its counsel fees and expenses.

All but forgotten in this welter of charge, countercharge, replication, impleader crossclaim and demand for indemnity is the injury sustained by the maritime worker. And yet, despite all of its apparent complexities, this is the key which unlocks the puzzle leading to our affirmance on substantive principles with some adjustments. For once the parties face up to one of the perils of our juridical system in which the event comes finally to be, not so much what it actually was, as what it has been judicially declared to be, this is the key to the riddle. For then it becomes the simple case of a hatch board that is too short.

The Libellant, Hebert, a longshoreman employed by Port Arthur Stevedore,[2] was injured aboard Shipowner's[3] vessel M/V JETTYE SKOU when, in the course of opening up No. 1 hatch at Port Arthur shortly after arrival of the vessel from Houston, a hatch board up-ended causing his foot and leg to drop into the opening producing serious injuries to his back. But that simple occurrence, so simply described, was not long to remain simple.

As Hatch No. 1 had been opened, cargo worked, and reclosed February 27, 1960, at Houston by Houston Stevedore,[4] Shipowner impleaded it, and later Port Ar-

2. Port Arthur Shipping Corporation.

3. D/S Ove Skou.

4. Southern Stevedoring & Contracting Company.

thur Stevedore on the now familiar breach of the implied warranty of workmanlike performance. Likewise, it impleaded Time Charterer,[5] who, in the spirit of the times, in turn impleaded Houston Stevedore and Port Arthur Stevedore on the dual theory of an express contractual indemnity contract and breach of the *Ryan* warranty and the Shipowner for breach of the implied warranty of seaworthiness under the charter party.

Despite these ramifications, the respective theories were also quite simple. Hebert, almost content with the prospect of a decree against a single, solvent respondent, Shipowner, nevertheless sued Time Charterer as well asserting that a vessel with a too-short hatch board was unseaworthy and the owner and Time Charterer were negligent. Shipowner, first denying the occurrence, charged that Houston Stevedore, in knowingly using a too-short hatch board on closing of the hold a few hours before, had breached its WWLP.[6] It charged that Port Arthur Stevedore had done likewise in failing properly to make inspection and discovery of this hazard preparatory to

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5. United Fruit Company.

The charter was a Government form, Produce Exchange Time Charter. The warranty clause prescribed that the owners would "* * * keep the vessel in a thoroughly efficient state in hull, machinery, and equipment for and during the service." It also provided:

> "8. That the Captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with ship's crew and boats. The captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency, and Charterers are to load, stow and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented in conformity with Mate's or Tally Clerk's receipts."

6. Warranty of Workmanlike Performance.

opening the hatch. Against Time Charterer, indemnity was sought because the Charterer was to load and stow the cargo (see note 5, *supra*). Time Charterer asserted both breach of the WWLP and an express indemnity against Houston Stevedore and Port Arthur Stevedore.[7]

After a trial in which nearly all of the testimony was heard in open court, the admiralty Judge found the ship unseaworthy, Shipowner negligent, Libellant contributorily negligent by 20%, Houston Stevedore breached the WWLP for "placing the hatch board in question * * * and in not observing that it was short * * *," Port Arthur Stevedore breached its WWLP by "removing the hatch board * * * and in not observing that it was short * * *," but that since Shipowner "created the unseaworthy condition of the vessel * * * by equipping [her] with a short hatch board * * *, " it is entitled "to only fifty (50%) per cent indemnity from" Houston Stevedore, and Port Arthur Stevedore "* * * in equal amounts of twenty-five (25%) per cent each, based on their equal failure to perform * * * [the] stevedoring work in a safe and workmanlike manner * * *." Time Charterer was also allowed to recover its counsel fees and expenses subse-

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7. The stevedoring contracts contained this provision (letters in brackets being inserted for ease of reference):

"It is agreed between the parties that [a] the contractor shall be in full control of those parts of the vessel and adjoining land structures and areas in which it is conducting stevedoring operations, and [b] shall be responsible for all personal injuries, including death, incurred by all persons without exception, and for damage to property, wherever such personal injuries and damage occur, if caused in whole or in part by the negligence, whether active or passive, of the contractor, and [c] the contractor does hereby indemnify and hold harmless the company and its affiliated companies against all suits, claims or demands, including court costs and counsel fees, arising therefrom."

quently fixed by the Court from Shipowner and Houston Stevedore and Port Arthur Stevedore.[8]

No one is happy and all appeal.[9] Libellant seeks reversal of the 20% finding of contributory negligence. Shipowner seeks reversal as to the indemnity award against it for 50% of Time Charterer's counsel fees and to secure full, not 50%, indemnity from the Stevedores and Time Charterer and to increase the finding of contributory negligence from 20% to 50%. The Stevedores seek reversal of the 50% indemnity award against them (25% each) and as to the award of counsel fees to Time Charterer. Finally, Houston Stevedore seeks reversal of denial of indemnity against Port Arthur Stevedore.

But despite all of these intervening complications, the case is simple when we return to its simplicity. The case begins and remains a simple one if—and, of course, the if is a big one—the incident took place as Hebert contends and there was in fact a hatch board that was too short.

The No. 1 hatch had the customary hatch beams, King and Queen, with three sections of hatch boards. Following the regular practice after the battens were removed,

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8. In the Court's supplemental findings of fact fixing Time Charterer's fees and expenses, the Court, presumably rejecting a number of post trial petitions for rehearing which sought an express finding that Shipowner was precluded from asserting indemnity did find that Shipowner "was negligent in supplying the short hatch board * * *." Shipowner argues that with this change fell also the contention that the defect in the board was "latent."

9. To Time Charterer, happiness is an affirmance of its decree against Shipowner and Stevedores for counsel fees and a rejection by this Court of Shipowner's appeal seeking indemnity from it. This leads it to take a "protective appeal" as to the trial Court's rejection of its claim of full indemnity over against the two Stevedores.

Hebert and several other fellow workers rolled back the tarpaulin which exposed all of the hatch boards. Apparently working in the center section first and in the center of the hatch, Hebert's fellow worker removed the first hatch board. Hebert came in from behind him to get the adjoining board and had to stand on another one. As he looked at its surface, it looked ordinary. But all of a sudden, the end of the board on which he was standing tipped upward and, so he described it, it came up "like a seesaw" and one of his legs slipped full length into the hole.

Libellant was subjected to pressing cross examination both on pretrial depositions, which were frequently quoted, and in open court. He was substantially corroborated in his explanation of the injury and the occurrence by the walking foreman of Port Arthur Stevedore. This took two turns. One was a report by him at some time to the Ship's mate as to the occurrence, and a report of the injury to his employer and the insurer under the Longshoreman and Harbor Worker's Compensation Act. More important, and more direct, was that from the walking foreman, who was standing nearby hatch 1 superintending some other rigging operation. Although he does not undertake to say that he saw Hebert in the moment of the accident, he did observe him on the hatch with one leg substantially through the open space. The walking foreman was quite positive that one of the hatch boards was too short.

Of course it was not all one way. There was, first, the predicament facing any damage claimant in walking that narrow line between a thing that is bad but not too bad to be obvious. Libellant continues this course with some difficulty in his attack on the 20% reduction for contributory negligence. For he insists that the hatch boards

looked to be in order and while they varied in width and length as was usual, it was not such as to be spectacular. The question then is: what caused the board to up-end or seesaw? Likewise, there is the mystery about what happened to the board. If, as the theory envisages, it was so short that it did not overlap the lip of the King beam it would seem that if it up-ended causing Hebert to fall down part way through the space, the board would have fallen into the hold, but it did not do so.

But these are the stuff of which lawsuits are made. Accidents do happen that simply cannot occur. *Otis Elevator Co. v. Robinson*, 5 Cir., 1961, 287 F.2d 62, 64. Ships still collide, although at the moment of impact, each is going full astern through the water.

Whatever our misgivings about what we would decide were that committed to us, we know that if "we were to approach it as simply a question—how should this case be decided?—we would effectually bypass a trial court." For a "* * * trial of a hotly contested, sharply disputed case is the task of a trial court. * * * [and] Whether formulated in the mold of 'clearly erroneous' or followed intuitively as a measure, reviewing courts, even in admiralty * * * should be slow to overturn fact decisions made by the judge before whom the facts are annealed through the hammering heating process of vigorous, running advocacy." *Ohio Barge Line v. Oil Transport Company*, 5 Cir., 1960, 280 F.2d 448, 449, . . . AMC . . . And certainly there was, below and here, advocacy of the most intense nature. Indeed, natural self-interest in fleeing before *Ryan* is a sharp reminder that each must fend for one's self, oblivious to the lack of any symmetry in the total picture with positions taken that are either weak or strange simply because in the exigencies of

the moment, nothing else can be grasped. All the while, of course, the tribunal is left with the impression that the system must be good for discerning the truth since there is so little logical consistenecy in the tactics and strategy apparently being employed. And so it is here.[10]

Under familiar principles of F. R. Civ. P. 52(a) so long "judicially engrafted onto the admiralty procedure," *O/Y Finlayson Forssa A/B v. Panatlantic Steamship Corporation*, 5 Cir., 1958, 259 F.2d 11, 12, 13, 1958 AMC 2070; *McAllister v. United States*, 1954, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20, . . . AMC . . ., we have no doubt that our function calls for us to accept this basic finding as to the occurrence, the mechanism of it, and the resulting injury. From that point on, everything falls neatly into place.

Unseaworthiness of the vessel follows as a matter of course. *Mills v. Mitsubishi*, 5 Cir., 1966, 358 F.2d 609, . . . AMC. . . . And there is more than enough evidence for the Court to have concluded that, a hatch board being a part of the ship's regular equipment, the presence of the defective one was due to the negligence of Shipowner.

So, too, Houston Stevedore is clearly cast. For on the hypothesis of the judicially determined too-short hatch

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10. Shipowner does not challenge now the findings of injury, unseaworthiness, and ship's negligence, but concentrates on (a) increasing the finding of contributory negligence from 20% to 50% and securing 100% indemnity, not 50%, from the two Stevedores. Houston Stevedore attacks the award to the Libellant on the ground that liability was never established, while Port Arthur Stevedore, breathing as fervently as the Libellant, flatly asserts the "evidence clearly shows that the particular hatch board in question * * * was not suitable for the purpose for which it was intended, so as to allow the Board to kick up * * * resulting in" injury to Hebert.

board, the Judge was certainly entitled, if not compelled, to find a WWLP breach. All must recognize that whatever was the condition on opening of the hatch at Port Arthur existed at the moment of closing in Houston. Here custom, usage, and the industry's own approach, rather than indicating a laxness as is so often so when proof of this character is offered in tort situations, see *Schlichter v. Port Arthur Towing Co.*, 5 Cir., 1961, 288 F.2d 801, 804, 1961 AMC 1164; *June T., Inc. v. King*, 5 Cir., 1961, 290 F.2d 404, 406, 1961 AMC 1431, reflect an exacting standard of performance which becomes an adequate guideline for judicial appraisal. Both the superintending Stevedore and the president of Houston Stevedore acknowledged without reservation that a competent stevedore in the safe performance of its engagement in closing up hatches would be vigilant in determining whether the ship's hatch boards being put back in place were or had become defective. On the discovery of any such defects, such stevedore should report the deficiency to the appropriate ship's officer for necessary replacement or repair, and failing that, the necessary stoppage of work or other steps to avoid the hazards.

The hazards are well known since work, especially at succeeding ports, calls for much traffic on and over hatches. And certainly that is true in ports where, such as Houston and Port Arthur, the record shows that opening and closing hatches is considered longshoremen's, not ship's crew, work. In closing hatches, this operation includes rolling out the tarpaulins in place ready for battening down by the ship's crew. Consequently, in the absence of eagle-eye inspection at each stage of hatch closing, the ship must depend on the quality of the performance of the task by the stevedore.

The importance of hatch opening and closing is further demonstrated by the industry's acceptance of work rules requiring immediate, direct supervision of such activities by the gang foreman.[11] Indeed, the record reveals that in the eyes of the industry, the Federal Safety and Health Regulations for Longshoring, Title 29 C.F.R. §1504.31, although not effective until a few months after this incident, merely codify good industry practice,[12] and as such, they are certainly of relevance here. *Ray v. Compania Naviera Continental S.A.*, D.C.Md., 1962, 203 F. Supp. 206, 210, . . . AMC. . . .

Houston Stevedore can find no escape based on the assertion that as a part of the WWLP, the Stevedore had

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11. See, e.g., Rule 12 of the Marine Safety Council Safety Rules contained in the collective bargaining longshore agreement for Texas ports effective 1960:

"12. Hatch tenders or Gang foremen's responsibilities: he shall be recognized as the key man around whom the gang is formed. * * * The safety of the gang as well as the cargo is up to him. * * * He is required to give his personal attention to the removal of hatch covers and beams. Hatch covers must be piled neatly against bulwark. * * * When work is stopped, the necessary beams must be shifted in place, and hatch covers put on in proper order and squarely landed."

12. 29 C.F.R. §1504.31:

"(c) Missing, broken, split, or poorly fitting hatch covers that would jeopardize the safety of employees shall be reported at once to the officers in charge of the vessel. Pending replacement or repairs of the vessel, work shall not be performed in the section containing the unsafe covers or in adjacent sections unless the flooring is made safe.

"(d) When the hatch covers and beams are not of uniform size, they shall be placed only in the hatch, deck, and section in which they fit properly."

no obligation as a matter of law to discover latent defects.[13] The trial Court did not find that the too-short board was a latent defect. On the contrary, on partial rehearing, it categorically held that the Shipowner had negligently supplied a defective board—a conclusion which implies that with a reasonable amount of attention, the defect would have been discerned. And considering the distinction between the duty of the injured workman to exercise reasonable prudence for his own safety and that encompassed in the WWLP, the finding of 20% contributory negligence cuts no real figure. Nor does it succeed by the *Weyerhaeuser* contention that Shipowner's "conduct * * * [was] * * * sufficient to preclude recovery." *Weyerhaeuser S.S. Co. v. Nacirema Co.*, 1958, 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed2d 49, . . . AMC. . . . In the final analysis, this attack comes down to nothing more than the assertion that Shipowner furnished an unseaworthy vessel by supplying a too-short hatch board, which Stevedore had no reason to suspect was, or might be, too short. This is but a repetition of the defense so long rejected that negligence of the shipowner or unseaworthiness of the vessel by reason of the defective appliance does not of itself foreclose indemnity. *Lusich v. Bloomfield S.S. Co.*, 5 Cir., 1966, 355 F.2d 770, . . . AMC . . .; *T. Smith & Son, Inc. v. Skibs A/S Hassel*, 5 Cir., 1966, . . . F.2d . . ., . . . AMC . . . [No. 20767, June 23, 1966].

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13. CIA Maritima Del Nervion v. James J. Flanagan Ship. Corp., 5 Cir., 1962, 308 F.2d 120, ____AMC____; Parker v. United States, D.Ore., 1963, 223 F.Supp. 647, ____AMC____; Ray v. Compania Naviera Continental, S.A., D.C.Md., 1962, 203 F.Supp. 206, ____AMC____; Sciarrillo v. Steamship S/S Fred Christensen, S.D. N.Y., 1962, 206 F.Supp. 182, ____AMC____; Ferrigno v. Ocean Transport Ltd., 2 Cir., 1962, 309 F.2d 445, ____AMC____; Pena v. A/S Dovrefjell, S.D.N.Y., 1959, 176 F.Supp. 677, ____AMC____.

Coming from the lips of two high executives who could speak authoritatively for Houston Stevedore, this record affirms the industry's awareness of the likelihood of damaged or defective hatch boards, the obvious hazards from the use of them and the practical requirement that a good stevedore in the course of safe operations would not knowingly put them back in place. The stevedore having the last operational contact with them is in a position to avoid altogether, or minimize greatly, the hazard. At least the trier of fact could so find.

Although more troublesome as to Port Arthur Stevedore, the problem and result are the same as for Houston. The difficulty comes from the recognized principle, variously stated, that the WWLP does not as a matter of law require a thorough inspection of the vessel for "visual defects" or those not disclosed by a "cursory" examination, the consequence being that the *Ryan* indemnity ordinarily arises only where the stevedore had actual notice of the defect in time reasonably to take some corrective steps.[14]

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14. See, e.g.:

"Courts allowing indemnity against the stevedore when a longshoreman has been injured through a defect in the ship's ladder or other similar equipment have done so, uniformly, only where the stevedore had actual notice of the hazardous situation and failed to take any steps to remedy it." CIA Maritima Del Nervion v. James J. Flanagan Ship. Corp., 5th Cir., 1962, 308 F.2d 120, 124, ____AMC____.

"Nor can we say, as a matter of law, that failure to make a prior inspection is a breach of the standard of performance which a stevedore impliedly warrants to the shipowner." (308 F.2d at 125)

"* * * we are asked to establish, as a part of the stevedore's standard of a safe and workmanlike performance, a rule of law that failure by a stevedore to make a thorough inspection of a ship for any 'visual defects' before work by his longshoremen commences will subject him to liability for any injuries occurring

On this premise, Port Arthur Stevedore then constructs this thesis. Considering that Hebert could not see the defect although he looked and in failing to look better the trial Court charged him with only 20% of the blame and no one at Houston was aware of it, the deficiency must have been very obscure at best. Consequently, the argument runs, it would not have been discoverable except by great vigilance than this legal standard requires and, both by its very nature and the time sequence of the interval between any assumed "cursory" discovery of it and the fall would have been too short to permit effective remedial action.

Several factors weaken considerably, if they do not completely undermine, the soundness of this structure. The first is that this is merely a rehash of the contention that the hatch board was not deficient and had not up-ended as Libellant claimed. But Port Arthur Stevedore sides with

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to the longshoremen because of these defects. Neither prior cases nor the practicalities of the situation point to such a result." (308 F.2d at 123)

The Second Circuit has phrased it:

"We hold that an implied warranty of workmanlike performance by a stevedore does not place upon him a duty to discover defects in the apparatus or equipment furnished by the vessels being loaded or unloaded which are not obvious upon a cursory inspection." Ignatyuk v. Transp. Chartering Corp., 2 Cir., 1957, 250 F.2d 198, 201.

T. Smith & Son, Inc. v. Skibs A/S Hassel, 5 Cir., 1966, ____F.2d ____, ____AMC____ [No. 20767, June 23, 1966]; Moore-McCormack Lines, Inc. v. Maryland Ship Ceiling Co., 4 Cir., 1962, 311 F.2d 663, ____AMC____; Orlando v. Prudential S.S. Corporation, 2 Cir., 1963, 313 F.2d 822, ____AMC____; Calderola v. Cunard S.S. Co., 2 Cir., 1960, 279 F.2d 475, ____AMC____; Ray v. Compania Naviera Continental, S.A., D.Md., 1962, 203 F.Supp. 206, ____AMC____; Pena v. A/S Dovrefjell, S.D.N.Y., 1959, 176 F. Supp. 677, ____AMC____; Parker v. United States, D.Ore., 1963, 223 F.Supp. 647, ____AMC____.

Hebert that the board was deficient. The next is that *Flanagan* states in a negative form what the law does not require *as a matter of law*. This leaves open for traditional assessment by the trier of the fact the question of *fact* as to what constitutes WLP or a breach of WWLP. Likewise, the industry has itself supplied other dramatic and positive proof of what it regards to be the acceptable standard of performance. Work rules with safety in mind require that the gang foreman give his personal attention to the removal of hatch covers and beams (see note 11, *supra*). And yet the Walking Foreman for the Port Arthur Stevedore acknowledged that Port Arthur Stevedore neither had nor enforced any rule requiring compliance with Rule 12 by its gang foreman and, to the contrary, this was a matter left pretty largely to the action of individual longshoremen working on, over, or around hatch openings or closings. In the face of that admission, in the light of the self-imposed standard, the expert testimony concerning hazards and steps to be taken by stevedores coming from high officials of the Houston Stevedore, the implied finding which we have credited that the nature of the deficiency was such that it ought to have been observed by Libellant and Houston Stevedore earlier, and the complete failure of Port Arthur Stevedore to show what the gang foreman had actually done on this occurrence,[15] the trial Court was certainly justified in drawing the conclusion as a fact (or legal fact) that this breached the WWLP.

The industry set the standard of vigilance. Port Arthur Stevedore made no effort to satisfy that standard. In the absence of contrary proof from those having access to

15. The gang foreman was not produced as a witness. The record shows he was away squirrel hunting.

knowledge of the immediate events, the Court was warranted in inferring that had this vigilance been exercised, the defect would have been revealed. On this approach the obligation of Port Arthur Stevedores to indemnify rests on what ought to have been done earlier by it, *cf. T. Smith & Son, Inc. v. Skibs-A/S Hassel*, 5 Cir., 1966, ___ F.2d ___, ___ AMC ___, not on any supposed existence of sufficient time between Hebert's theoretical discovery of the deficiency and the moment of the accident.[16] Likewise, this minimizes greatly, if it does not disregard altogether, Hebert's own negligence which, we now recognize, may be imputed to Port Arthur Stevedore as a factor in assaying breach of the WWLP. *Lusich v. Bloomfield Steamship Co.*, 5 Cir., 1966, 355 F.2d 770, ___ AMC ___, distinguishing *Drewery v. Daspit Bros. Marine Divers, Inc.*, 5 Cir., 1963, 317 F.2d 425, ___ AMC ___.

We thus affirm the substantive findings of breach of the WWLP by both Stevedores. That precipitates the question whether there was proof, finding, or both, that the conduct of Shipowner precluded indemnity and, if so, to what extent. Literally, there are no such findings. The closest the trial Court came was, first, to characterize as "negligent" the Shipowner's furnishing of the too-short board, earlier found to be an unseaworthy fitting, and, second, apportion this on a 50-25-25 basis. As to the first, this really adds nothing "to take it out of the general rule that negligence of the shipowner is not a bar to

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16. See also Guarracino v. Luckenbach S.S. Co., 2 Cir., 1964, 333 F.2d 656, ___ AMC ___; Calmar S.S. Corp. v. Nacirema Operating Co., 4 Cir., 1959, 266 F.2d 79, ___ AMC ___; Holly v. The Manfred Stansfield, E.D.Va., 1960, 186 F.Supp. 212, ___ AMC ___; Smith v. Jugosalvenska Linijska Plovidea, 4 Cir., 1960, 278 F.2d 176, ___ AMC ___; Metropolitan Stevedoring Co. v. Dampskisaktieselskabet Int., 9 Cir., 1960, 274 F.2d 875, ___ AMC ___.

recovery." *T. Smith & Son, Inc. v. Skibs A/S Hassel*, 5 Cir., 1966, ____F.2d____, ____AMC____. And, as we have intimated above, we find nothing in the record which would compel a finding that Shipowner's negligence, the vessel's unseaworthiness, or both, were of such a character as to preclude indemnity as a matter of law. On the hypothesis, which simply has to run throughout this whole case, that the board was too short and the accident occurred substantially the way the Libellant claims it did, the Judge was entitled to infer that there was nothing about this prior negligence or unseaworthiness which would "prevent or seriously handicap the stevedore in his ability to do a workmanlike job," as the Second Circuit phrases the preclusion test. *Albanese v. N.V. Nederl Amerik Stoomv Meats, etc.*, 2 Cir., 1965, 346 F.2d 481, 1965 AMC 1201; *Mortensen v. A/S Glittre*, 2 Cir., 1965, 348 F.2d 387, 1965 AMC 2016; or as we have expressed in several ways in *Waterman S.S. Corp. v. David*, 5 Cir., 1965, 353 F.2d 660, ____AMC____.

As to the second—the percentage apportionment—this is a result, not a reason for, and it is precisely here where we find this device wanting in this case. We discern neither finding nor proof as to the reason why. Consequently, without undertaking to rule for all time that in the adjustment of these complex warranties and counter warranties or promises,[17] there may never be an acceptable, equitable basis for distributing the burden of a loss resulting from the operational cooperation of breaches or

17. See, e.g., Pettus v. Grace Line, Inc., 2 Cir., 1962, 305 F.2d 151, ____AMC____; Waterman S.S. Corp. v. David, 5 Cir., 1965, 353 F.2d 660, ____AMC____; DeGioia v. United States Lines Co., 2 Cir., 1962, 304 F.2d 421, ____AMC____; Metropolitan Stevedoring Co. v. Dampskisaktieselskabet Int., 9 Cir., 1960, 274 F.2d 875, ____AMC____.

wrongs of several parties,[18] we certainly see no basis for it here.

The result is that we sustain Shipowner's appeal by modifying the decree to allow 100% indemnity against each of the Stevedores to be borne by them 50-50.

But we think that the trial Court was clearly correct in denying Shipowner indemnity against Time Charterer. And this is so whether based on the theory of third party beneficiary to the express indemnity agreement between the Stevedores and Time Charterer (see note 7, *supra*) or implied as a sort of extension of the *Ryan* concept. Assuming that—and the assumption is a big one—that Shipowner can claim the benefit of Time Charterer's subsidiary contract with the Stevedore,[19] there is no finding of negligence against either one or both of the Stevedores. The Court did find breach of the WWLP, but that is a far different matter, and we are certainly not in a position to say that on principles of negligence, as such, the trial

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18. Assuming, as some knowledgeable persons doubt, Gilmore & Black, Admiralty, p.371 (1957); Grace Lines, Inc. v. Port Everglades Term. Co., 5 Cir., 1963, 324 F.2d 699, 701 ____AMC____; ____, that in a practical way there is any practical vitality in Halcyon Lines v. Haehn Ship Ceiling & Refitting Corp., 1952, 342 U.S. 282, ____S.Ct.____, ____L.Ed.____, ____AMC____, we do not think this outlaws for all time judicial improvisation in the accommodation of this dynamic Sieracki-Ryan-Yaka-Italia concept. Difficult as it conceptually is to read out handy, everyday notions of prudence, due care on the ground that tort principles as such are not pertinent, Italia Societa v. Oregon Stevedoring Co., 1964, 376 U.S. 315, 84 S.Ct. 748, 11 L.Ed.2d 732, ____AMC____, the process is inevitably a comparative one (see Pettus v. Grace Line, Inc., 2 Cir., 1962, 305 F.2d 151, ____AMC____, supra) perhaps justifying comparative techniques sometimes.

19. See Pettus v. Grace Line, Inc., 2 Cir., 1962, 305 F.2d 151, ____AMC____; Ferrigno v. Ocean Transport Ltd., 2 Cir., 1962, 309 F.2d 445, ____AMC____.

Court was compelled to make such holding as to the Stevedores. And yet the contractual indemnity requires "negligence * * * of the contractor."

Insofar as the Shipowner, standing on its own rights, asserts an implied warranty of the *Ryan* type, we think it fails for a number of reasons. First, there was no demise of the vessel. The Charterer had the responsibilities, but only the responsibilities, of a time charterer under a traditional time charter. The typical clause (note 5, *supra*) specifying that the captain shall be under the orders of the Charterers "as regards employment and agency" and that "charterers are to load, stow, and trim the cargo" does not give to Time Charterer any operational control over these activities. Rather, these charter party provisions are essentially a specification of the party—owner or charterer—upon whom the ultimate financial cost rests for any one or more of the activities.

Although, the charterer is to secure and pay for such port activities as pilotage, towage, port charges, including arrangements for loading and discharging of cargo, such activities if conducted by the ship or its crew do not become those for which the time charterer has an operational responsibility. Thus, for example, under the typical obligation to pay for port charges, pilotage, towage, etc., "the charterer is not liable for the negligence of the tugs which he has employed to dock the vessel" and as to a pilot arranged and paid for by the charterer "* * * it is the owner and not the charterer who is liable for his negligence in navigating."[20] In the absence of circumstances which would give rise to a liability for actions

20. Poor, Charter Parties and Ocean Bills of Lading (4th Ed., 1954), §1-16 and see especially §7.

taken by an independent contractor[21]—none of which are present here—Time Charterer had no responsibility to Shipowner or to third persons including longshoremen for acts of omission or commission by the stevedores. There is nothing in *Ryan*—certainly not yet—by which a time charterer is held to have warranted that persons performing activities for which a time charterer has the ultimate financial responsibility will perform their respective engagements in a workmanlike fashion.

There was thus no basis for Shipowner to recover indemnity from Time Charterer.

Indeed, the opposite is true which means, as contended for by the Stevedores, it is Shipowner, not Stevedores, who should bear counsel fees and expenses awarded to Time Charterer and apportioned on the 50-50 basis. As was true in the claim of Shipowner versus Time Charterer just discussed, we find no basis in the record for awarding indemnity against Stevedores based on the express contract (note 7, *supra*). There is no finding of negligence as such. There is at most a finding of a breach of the WWLP. Likewise, Time Charterer having no operational responsibility for the conduct of the Stevedore's work makes no implied warranty of a *Ryan* kind which either counterbalances or makes immaterial the ship's own warranty of seaworthiness. In other words, as between Time Charterer and ship, there is no place for the *Weyerhaeuser* preclusion doctrine. Here on the express findings of the trial court, Shipowner not only breached its warranty of seaworthiness contained in the charter (see note 5, *supra*) but it did so "negligently." Where the "owner * * * agrees to maintain his ship in a thoroughly efficient state in hull and machinery * * *" during the charter period, the

21. E.g., inherently dangerous operation.

"* * * charterer may have damages" for "* * * the breach of this obligation" including, as an example, specifically for the failure "to keep the winches in repair." Poor, note 20, *supra.*

There remains the question of whether the two Stevedores are liable under *Ryan* to Time Charterer. That its defense was successful would not, of itself, prevent indemnity for counsel fees and expenses. *Strachan Shipping Co. v. Koninklyke*, 5 Cir., 1963, 324 F.2d 746, ____ AMC____; *Lusich v. Bloomfield S.S. Co.*, 5 Cir., 1966, 355 F.2d 770, ____AMC____. But while the trial Court's findings of breach of the WWLP by each of the Stevedores, resting as it does upon the relationship between ship and Stevedore, would likely give Time Charterer as the immediate employer of Stevedore the full benefit of such findings, we might have difficulty in seeing how it was the breach of the WWLP which brought about these costs had Time Charterer merely been impleaded by Shipowner. But here it was by Libellant sued directly as a respondent. In that situation there seems to be no reason why Time Charterer as the immediate employer of the Stevedores should not have the benefit of the *Ryan* indemnity. Consequently, the award of 50% of such costs awarded Time Charterer against Stevedores is affirmed. So, too, is the award of 50% against Shipowner. Time Charterer does not seek other or further relief if, as we have done, we reject Shipowner's contention, that Time Charterer, too, should be cast for full indemnity.

This leaves[22] perhaps a tag end as to whether Ship-

22. For reasons discussed at length in assaying breach of WWLP by the Stevedores, we have no warrant to alter the trial Court's 20% contributory negligence finding. All such appeals are rejected.

In like fashion we dispose of Houston Stevedore's indemnity against Port Arthur Stevedore as being without any merit.

owner's general attack is sufficient to encompass a contention that the 50% of Time Charterer's counsel fees assessed against it by the Court should be passed off 100% onto the Stevedores, as was done above for the indemnity generally. Clearly, as between Time Charterer and Shipowner who breached the warranty of seaworthiness owed to Time Charterer, there is no place for the *Weyerhaeuser* preclusion doctrine. To a very real extent, therefore, Shipowner has incurred a liability for this obligation not because of any failure on the part of the Stevedores, but because of the extensive contractual undertaking to Time Charterer encompassed within its warranty of seaworthiness in the charter party. To this extent these costs are analogous to special damages which, more remote because occasioned by a contractual undertaking, are not recoverable ordinarily against a third party. Again, without making any definitive ruling for all time; we think on this record this is a situation in which the apportionment made by the trial Court appears to be equitable and warranted. The Shipowner and the Stevedores therefore bear this 50-50 without further recourse one against the other.

As the case has to be remanded for the entry of appropriate orders after such hearings as may be necessary to fix the amount of the costs and expenses for which Shipowner is entitled to indemnity, this Court deems it preferable that this encompass as well all appropriate claims for counsel fees and expenses incident to the appeals and cross appeals and any other adjusfments reqdired by our decision.

REVERSED IN PART AFFIRMED IN PART AND AS MODIFIED REMANDED.

APPENDIX "C"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 22,205

D/S OVE SKOU, Et Al,
Appellant,

V.

JAMES B. HEBERT, Et Al,
Appellees.

Appeal from the United States District Court for the Eastern District of Texas

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(June 16, 1970)

ON PETITION FOR REHEARING

Before BROWN, Chief Judge, JONES and DYER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

SEP 14 1970
E. ROBERT SEAVER, CLERK

NO. 533

IN THE

Supreme Court of the United States

October Term, 1970

SOUTHERN STEVEDORING & CONTRACTING COMPANY, *Petitioner*

v.

D/S OVE SKOU, *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION AND CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TOM M. DAVIS
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(1) The Houston Stevedore picked up and put in place a hatch board which was too short to extend the distance between the beams, and the injured longshoreman stepped on it 39 hours later and fell through—was there a causal connection between the Houston Stevedore's breach of warranty and the injured longshoreman's fall? 3-4

(2) Is there any sound legal basis for requiring the Vessel Owner to bear half the attorneys' fees of the Time Charterer, for which fees the two stevedores are contractually liable, when the Time Charterer had no legal liability to the plaintiff anyway, according to well settled principles of law? 4

(3) Even if the Vessel Owner were legally responsible, on some theory, to the Time Charterer for half of its cost of defending the longshoreman's invalid action against it, isn't that expense part of the owner's indemnity recovery over against the Houston and Port Arthur Stevedores? 4

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Deep Sea Longshore and Cotton Agreement for Texas Ports and The Port of Lake Charles, Louisiana, Effective October 1, 1956 as Extended	6

NO. _____

IN THE

Supreme Court of the United States

October Term, 1970

SOUTHERN STEVEDORING & CONTRACTING COMPANY, *Petitioner*

v.

D/S OVE SKOU, *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION AND CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NECESSARY PRELIMINARY STATEMENT

This case grows out of an injury sustained on February 29, 1960 by James B. Hebert (the injured longshoreman) who fell as a result of stepping on a short hatch board. At the time he was employed as a longshoreman in Port Arthur, Texas and was assigned the task of uncovering a hatch on the SS JYTTE SKOU. He was employed by Port Arthur Shipping Corporation (Port Arthur Stevedore). The hatch board had been put in place in Houston some 39 hours earlier by the Petitioner, Southern Stevedoring & Contracting Company (the Houston Stevedore).

D/S Ove Skou, Respondent and Cross Petitioner (the Vessel Owner) had time chartered the vessel to United Fruit Company (the Time Charterer). The Time Charterer had contracted for the stevedoring with each of the two stevedors, and had made written provisions for indemnity. The Vessel Owner was not a party to these written indemnity agreements and sued the two stevedores on the *Ryan* theory.[1]

The trial court found that the Houston Stevedore breached its warranty in installing a board which was too short,[2] that the Port Arthur Stevedore breached its warranty in failing to discover the short hatch board,[3] and, while this occurred before the recent flurry of cases dealing with contributory negligence of injured longshoremen and its effect on the employer's breach of warranty, the court also found that the injured longshoreman was negligent in failing to discover the short hatch board.[4] However, the trial court attempted to award only "50% indemnity", and the Court of Appeals reformed the judg-

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1. *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956).

2. "Southern Stevedoring & Contracting Company, in placing the hatch board in question in the place where it was, and in not observing that it was short, failed to do its work in a safe and workmanlike manner, which contributed to cause the accident and injuries suffered by Libellant." Findings of Fact VIII, Appendix "A", page 33 of Houston Stevedore's petition and 232 F. Supp. 277 at page 280.

3. "Port Arthur Shipping Corporation, in removing the hatch board in question and in not observing that it was short, failed to do its work in a safe and workmanlike manner, which contributed to cause the accident and injuries suffered by Libellant." Findings of Fact IX, Appendix "A", page 33 of Houston Stevedore's petition and 232 F. Supp. 277 at page 280.

4. "Libellant negligently failed to keep a proper lookout for his safety, which contributed to cause his injuries by twenty (20%) per cent." Findings of Fact X, Appendix "A", page 33 of Houston Stevedore's petition and 232 F. Supp. 277 at page 280.

ment by decreeing that the Vessel Owner should recover full indemnity.

Nonetheless, the Vessel Owner was ordered to bear one-half of the attorneys' fees of the Time Charterer. While this involves a negligible amount of money in contrast with the rest of the case, that is clearly wrong. The Vessel Owner not only responds here to the petition of the Houston Stevedore (who apparently seeks to obtain a finding that its breach was not causally connected with the injury), he also seeks to have the Court of Appeals judgment reformed as to its requirement that the Vessel Owner pay one-half of the expenses of the Time Charterer, or at least that the Vessel Owner be given the right to recover that amount of money over against the two stevedores.

OPINIONS BELOW

The opinion of the District Court is reported at 232 F. Supp. 277 and, along with that Court's supplemental finding of fact, is contained in Houston Stevedores petition, Appendix A. The opinion of the Court of Appeals of the Fifth Circuit is reported at 365 F.2d 341 (1966) and is reprinted as Houston Stevedore's Appendix B. The Court of Appeals order denying a Petition for Rehearing is printed as Houston Stevedore's Appendix C.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

(1) The Houston Stevedore picked up and put in place a hatch board which was too short to extend the distance

between the beams, and the injured longshoreman stepped on it 39 hours later and fell through—was there a causal connection between the Houston Stevedore's breach of warranty and the injured longshoreman's fall?

(2) Is there any sound legal basis for requiring the Vessel Owner to bear half the attorneys' fees of the Time Charterer, for which fees the two stevedores are contractually liable, when the Time Charterer had no legal liability to the plaintiff anyway, according to well settled principles of law?

(3) Even if the vessel owner were legally responsible, on some theory, to the Time Charterer for half of its cost of defending the longshoreman's invalid action against it, isn't that expense part of the owner's indemnity recovery over against the Houston and Port Arthur Stevedores?

STATEMENT OF THE CASE

The facts of the case are stated fully in the decisions of the District Court (Houston Stevedore's Appendix A at pages 27-38) and the Court of Appeals (Houston Stevedore's Appendix B at pages 39-60) and summarized in the Necessary Preliminary Statement.

ARGUMENT

The Houston Stevedore's petition erroneously states that the Vessel Owner *knew* that the hatch board in question was too short to reach between the beams, and that it callously, if not deliberately and purposely, refused to do anything about it. There is no finding, evidence, nor even hint that the Vessel Owner was guilty of such a conscious disregard of the safety of others. If there had been a determination based upon "fact decisions made

by the Judge before whom the facts [were] annealed through the hammering, heating process of vigorous running advocacy," it might be a different matter, but that is not the present case.[5]

The Trial Court found "that the Respondent, D/S Ove Skou, was negligent in supplying the short hatch board for use at hatch #1, which negligence contributed to cause the accident and injury suffered by Libellant."[6] There is no finding anywhere that the Vessel Owner knew that the Houston Stevedore had picked up a hatch board which did not fit and put it in place, nor is there any finding anywhere in the record from which it may be legitimately argued that the court did so find. There is a tremendous difference between conscious knowledge and "should have known."

The answer to the contention that there was an intervening cause is contained in footnote 25 of Houston Stevedore's petition.[7] The facts are that if the Houston Stevedore had not placed the short hatch board between the beams, instead of one of those which fit properly, the accident never would have occurred. The fact that the Port Arthur Stevedore was equally at fault does not relieve the Houston Stevedore.

In effect, the Houston Stevedore is really arguing that the Port Arthur Stevedore was equally at fault, and by

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5. Quoted words from Opinion of Court below, 365 F.2d 341, at page 346, Houston Stevedore's petition, Appendix B, page 46.

6. Supplemental Findings of Fact IV, Appendix "A" of Houston Stevedore's petition, page 37.

7. Houston stevedore's petition at page 22, footnote 25, states in part: "Perhaps the answer is so obvious that everyone but the Houston Stevedore's inept counsel knows what it is and it is unnecessary to articulate it just for them."

the same token is making a similar argument against the vessel. This is an attempt to argue "conduct sufficient to preclude indemnity" in a situation, again, where it is necessary to alter the evidence and the findings in order to come up with such an argument. It makes no difference that the vessel owner was negligent. The Vessel Owner did not interfere with the operations of the Houston Stevedore. While the chief mate did check the closing of a hatch, he was concerned with watertight integrity, and the stevedore was charged with fitting the hatch boards.[8]

The Houston Stevedore's reliance upon *Reddick v. McAlister Lighterage Line, Inc.*, 258 F.2d 297 (2 Cir., 1958, cert. den. 358 U.S. 908) is misplaced. Except for the fact that that case involves a latent defect, it would give more comfort to the Port Arthur Stevedore than the Houston Stevedore. As it is, the Houston Stevedore is in the position of being the party really responsible for that accident, according to that decision, and even more so, since this did not involve a latent defect.

Independent of the vessel's non-delegable legal liability to the injured longshoreman, the stevedores have certain rules which regulate these operations in the Gulf Coast. The Deep Sea Longshore and Cotton Agreement for Texas Ports in effect at the time this case arose states in Rule No. 1:

> "When vessel is in loading or unloading berth * * * opening and closing of hatches * * * is longshore work and will not be done by ship's crew."

The Contract, in Rule No. 2 subsection 12, states in part:

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8. United States Court of Appeals for the Fifth Circuit, Printed Record Page 234. Also see pages 290 and 291.

> "Hatch tenders or Gang Foremen's responsibilities: * * * he shall be recognized as the key man around whom the gang is formed. * * * The safety of the gang as well as the cargo is up to him.
>
> He is required to give his personal attention to the removal of hatch covers and beams. Hatch covers must be piled neatly against bulwark. * * * When work is stopped, the necessary beams must be shifted in place, and hatch covers put on in proper order and squarely landed."

Furthermore, in the eyes of the industry the Federal Safety and Health Regulations for Longshoring, Title 29 C.F.R. § 1504.31, although not effective until a few months after the incident, codified good industry practice. In part, these regulations state:

> "(c) Missing, broken, split, or poorly fitting hatch covers that would jeopardize the safety of employees shall be reported at once to the officers in charge of the vessel. Pending replacement or repairs of the vessel, work shall not be performed in the section containing the unsafe covers or in adjacent sections unless the flooring is made safe.
>
> "(d) When the hatch covers and beams are not of uniform size they shall be placed only in the hatch, deck, and section in which they fit properly."

Consequently the Houston Stevedore was responsible for the removal of the boards, and after the work in the hold was completed, supervising the closing of the hatch without the assistance and guidance of the ship's crew. In view of this, and in view of the fact that the Houston Stevedore is so adamantly concerned about the ship's *knowledge* of the existence of the too-short hatchboard, it should be obvious to all — including the Houston Steve-

dore — that the attending longshoremen are the ones who should have recognized the defect in the hatchboards. Had they done so, one of the spare hatchboards lying where they could plainly be seen by the longshoremen would have been provided and the defect would have been cured.[9] This they failed to do and the Houston Stevedore consequently failed to do its work in a reasonably safe and workmanlike manner.

The Houston Stevedore is unnecessarily distressed that it has been unable to prevail in its argument that due to the 39 hour voyage to Port Arthur, there was an intervening cause. The Court of Appeals correctly observed:

> "All must recognize that whatever was the condition on the opening of the hatch at Port Arthur existed at the moment of closing in Houston."

In analyzing Houston Stevedore's reliance on the *Weyerhaeuser* doctrine it would be difficult to improve on the language used by the Court of Appeals;[10] at page 348 that Court stated:

> "Houston Stevedore can find no escape based on the assertion that as part of the WWLP, the stevedore had no obligation as a matter of law to discover latent defects. The Trial Court did not find that the too-short board was a latent defect. On the contrary, on pre-trial hearing it categorically held that the shipowner had negligently supplied a defective board —a conclusion which implies that with a reasonable amount of attention, the defect would have been

9. United States Court of Appeals for the Fifth Circuit, Printed Record Pages 140 and 214.

10. *Weyerhaeuser S.S. Co. v. Nacirema Co.*, 355 U.S. 563, 78 S. Ct. 438, 2 L.Ed.2d 491 (1958).

> discerned. . . . Nor does it succeed by the *Weyerhaeuser* contention that shipowners 'conduct * * * (was) * * * sufficient to preclude recovery' *Weyerhaeuser S.S. Company v. Nacirema Company* 1958, 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed. 2d 49 . . . AMC . . . In the final analysis, this attack comes down to nothing more than the assertion that shipowner furnished an unseaworthy vessel by supplying a too-short hatchboard, which stevedore had no reason to suspect was, or might be too short. This is but a repetition of the defence so long rejected that negligence of the ship owner or unseaworthiness of the vessel by reason of the defective appliance does not of itself foreclose amenity."

Perhaps the best way to conclude the argument that the Houston Stevedore's petition should be denied is to join in supporting its argument that the case may best be resolved by examining *Italia Societa v. Oregon Stevedoring Company; Inc.,* 376 U.S. 314, 11 L.Ed.2d 732, 84 S.Ct. 748 (1964). The rule as announced by this Court in that case was that:

> ". . . . liability should fall upon the party best situated to adopt preventive measures and thereby reduce the likelihood of injury."[11]

By virtue of the union contract and the methods of safety enforced in the Gulf Coast area, the Houston Stevedore was charged with the responsibility of replacing the hatchboards. If there was any defect it was their responsibility to call it to the ship's attention and the ship was entitled to rely on the Houston Stevedore's warranty of workmanlike performance in this regard. The Houston

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11. 376 U.S. 315 at page 319, 11 L.Ed.2d 732 at page 740, 84 S.Ct. 748, at page 754.

Stevedore was the last party actively involved in replacing and inspecting the hatchcovers and they were therefore in the best position to prevent the injury. By improperly sealing the hold they likewise sealed the fate of the plaintiff-longshoreman and the mere passage of time would not transfer this responsibility to anyone else.

For the foregoing reasons it is respectfully submitted that the Houston Stevedore's Petition for Writ of Certiorari should be denied.

REASONS FOR GRANTING THE CROSS-PETITIONER'S WRIT OF CERTIORARI

The Plaintiff sued both the ship owner and the Time Charterer, United Fruit Company, for his injuries based on the unseaworthiness of the SS JYTTE SKOU. While United Fruit Company was compelled to defend itself though not legally liable to the longshoreman, it had contractually provided for indemnity from the stevedores. In any event, these fees were not recoverable against D/S OVE SKOU according to any existing legal theory. It is incomprehensible that the Time Charterer can look to the Vessel Owner as opposed to the stevedores for satisfaction of these expenses. However, if the Vessel Owner is required to make this contribution to the Time Charterer it should be entitled to recoup them from the stevedores. The stevedores' breach of "warranty of workmanlike performance" caused the plaintiff's injury. As a consequence the Vessel Owner is entitled to be indemnified by the stevedores, for this, as well as its other damages occasioned by these breaches.

CONCLUSION

For the reason heretofore stated the Vessel Owner respectfully prays that Houston Stevedore's Petition for

Writ of Certiorari be denied and that this cross-petition be likewise granted, and that the all, not just half, of the Time Charterer's legal expense be borne by the Stevedores.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Petition for a Writ of Certiorari has been served upon Messrs. Mandell & Wright, First National Life Building, Houston, Texas, 77002, Attorneys for Plaintiff; Messrs. Royston, Rayzor & Cook, 877 San Jacinto Building, Houston, Texas 77002, Attorneys Southern Stevedoring & Contracting Company; Messrs. Eastham, Watson, Dale & Forney, Esperson Building, Houston, Texas 77002, Attorneys for United Fruit Company; Messrs. Fulbright, Crooker, Freeman, Bates & Jaworski, Bank of the Southwest Building, Houston, Texas 77002, and Messrs. Strong, Pipkin, Strong & Nelson, McFaddin Building, Beaumont, Texas, Attorneys for Port Arthur Stevedores Division of Port Arthur Shipping Corporation, by mailing copies to them at the address shown, first class postage prepaid, on the _____ day of September, 1970.

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B. D. MCKINNEY